Supreme Court, U.S.
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No. 99-289

IN THE
Supreme Court of the United States

AVIS W. BUTLER,
Petitioner,

v.

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD, in his individual and official capacities,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENTS

I. PETITIONER CORRECTLY ASSERTS THAT THERE IS A SPLIT OF AUTHORITY ON THE ISSUE OF WHAT TYPE OF "REASONABLE BELIEF" ONE MUST POSSESS CONCERNING THE CONDUCT SHE IS OPPOSING UNDER TITLE VII.

Respondents' first responsive argument is erroneous in several respects. The most obvious and blatant error is Respondents' claim that ". . . there is no split of authority" on the issue of whether one must have a subjective or objective belief that a practice she is opposing under Title VII is unlawful and "that the objective standard utilized by the lower court . . . is universally recognized." [Response to Petition for Writ of Cert., p. 3.] Respondents erroneously assert that the Seventh Circuit applies an objective standard. *Id.* at pp. 1-2. To further support her position that the circuits are split on the issue of "reasonable belief" and to show the Honorable Court that Respondents' Argument Number One is erroneous, Petitioner offers the court the case of *Dey v. Colt Const. and Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994).

Dey, supra, involved a retaliation claim under Title VII, and also an appellate review of a grant of a summary judgment motion. *Dey,* 28 F.3d at 1457. In *Dey,* as to the retaliation claim, the Seventh Circuit held that " 'it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct (that violates) Title VII.' " *Dey,* 1446 F.3d at 1458 (citing *Holland v. Jefferson Nat'l Life Ins. Co.,* 883 F.2d 1307, 1314 (7th Cir. 1989); also *Jennings v. Tinley Park Community Consolidated School Dist. No. 146,* 796 F.2d 962, 967 (7th Cir. 1986), *cert. denied,* 481 U.S. 1017 (1987). *Dey* also held that "[e]ven if a trial were to reveal that Dey's work environment was neither hostile nor abusive, that would not affect the sincerity or reasonableness of her belief that Chernoff

had acted in violation of the law." *Id.* at 1458 (cites from the 7th Circuit omitted). Critically important, the *Dey* Court noted that "it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case." *Id.* (citing *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982). Contrary to Respondents' claim, that the objective standard is "universally recognized" among the federal circuits, *Dey* unequivocally establishes that there is a split on the "reasonableness issue" among the circuits and that Respondents are egregiously wrong in its assertion that no such split exists. [Response to Petition for Writ of Cert., p. 3]

Further, Respondents' reliance upon *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), as the implicit creator of an objective reasonable standard in retaliation cases is misplaced. Respondents correctly state that the *Harris* Court stated: "Conduct that is not severe or pervasive enough to create an objective hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." [Response to Petition for Writ of Cert. p. 3]. However, Respondents failed to point out that the *Harris* Court also said in the next sentence: "Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's conditions employment, and there is no Title VII violation." *Harris*, 510 U.S. at 20. Therefore, this Court has implicitly adopted a subjective component to the reasonable belief standard in opposition retaliation cases, and the Seventh Circuit in *Dey* relied upon *Harris* to impart a subjective component in the reasonable belief inquiry in retaliation cases—an analytical framework that differs from the circuits that use the objectively reasonable standard. *Dey*, 28 F.3d at 1452-1454.

In addition to failing to acknowledge the split of authority on the issue of whether one must have a subjective or objective belief that a practice she opposes under Title VII is unlawful, Respondents do not acknowledge the fact that the First and Fourth Circuits, contrary to other federal circuits, use a balancing test for assessing opposition clause claims. "Whether an employee has engaged in protected opposition activity, turns upon balancing 'the purpose of the Act to protect persons engaging *reasonably* in activities . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (emphasis added); *see also Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999). The Fourth Circuit has held "that under this balancing test, as long as an employee complains to his or her employer or participates in an employer's informal grievance procedure in an orderly and nondisruptive manner, the employee's activiites are entitled to protection under section 704's opposition clause." *Laughlin*, 149 F.3d at 260. Therefore, in the Fourth Circuit under recent decisions, the objectively reasonable standard simply becomes the reasonable standard when used in conjunction with the balancing test. This new hybrid standard appears to depart from, but does not overrule previous case law in the Fourth Circuit that adhered to the more stringent objective reasonable standard. *See Kralawec v. Prince George's County*, 679 F.2d 883 (4th Cir. 1980), *cert. denied*, 459 U.S. 872 (1982).

Respondents note that Petitioner "suprisingly" categorized the Ninth Circuit as using both a subjective and an objective standard of good faith. Petitioner submits that she did include the Ninth Circuit in both analytical camps. This was not an academic slip of the pen. The Ninth

Circuit does use both standards, and it has used both standards in one case. For example, in *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994), the Ninth Circuit said: "It is not necessary, however, that the employment practice actually be unlawful; opposition clause protection will be accorded whenever the opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful employment practice. . . An erroneous belief that an employer engaged in an unlawful employment practice is reasonable, and thus actionable under 704(a), if premised on a mistake made in good faith. A good faith mistake may be one of fact or of law." *Moyo*, 40 F.3d at 984. The *Moyo* Court also stated that the Plaintiff's beliefs "that an unlawful employment practice occurred must be assessed according to an objective standard. . ." *Moyo*, 40 F.3d at 985. *Moyo*'s confusing application of the subjective and objective analytical framework in assessing the employee's belief in an opposition clause case under Title VII is a testament to Petitioner's claim that judicial confusion exists within the federal circuits. It is because of this confusion that the Court should grant the petition to settle the issues for the betterment of Title VII jurisprudence within the circuits.

II. PETITIONER DISPUTED THE LOWER COURT'S FINDING THAT SHE CANNOT PROVE PRETEXT AS TO THE LEGITIMATE NON-DISCRIMINATORY REASONS OFFERED FOR HER TERMINATION AND SHE WAS NOT REQUIRED TO RAISE THE PRETEXT ISSUE IN HER PETITION.

Respondents erroneously assert that Petitioner accepts the lower court's finding that she cannot prove pretext as to the legitimate non-discriminatory reasons offered for her termination. In an effort to establish a genuine issue of material fact at the trial court, Petitioner submitted detailed responses, by the way of Plaintiff's Responses to

Defendants Interrogatories, as part of her extensive response to Defendants' Motion for Summary Judgment. [Plaintiff's Response to Defendants' Motion for Summary Judgment, pp. 7-20; Butler Deposition, Exhibit 3]. Petitioner also refuted the reasons given for her termination on at least two occasions prior to the Motion for Summary Judgment. [Butler Depo., Exhibits 2, 3]. She also raised the pretextual issue at the Fourth Circuit Court of Appeals. [Informal Brief, pp. 10-18; Petition for Rehearing with Suggestion for Rehearing En Banc, pp. 9-13]. Thus, Respondents' claim and suggestion that Petitioner quietly sat back and accepted the lower court's erroneous finding on pretext is patently without merit.

As to Respondents' claim that Petitioner failed to properly preserve the pretext issue before this court, Petitioner submits that she was only required to show compelling reasons why the petition should be granted, not the errors which consisted of erroneously factual findings or the misapplication of properly stated rule of law. [Rules of the Supreme Court of the United States, Rule 10]. Although Petitioner was not required to raise the pretext issue in the petition, she raised it in the Statement of Facts and submitted a detailed response to each reason for termination in the Petition. [Pet. for Writ of Cert., pp. 6-7 and Appendix E, pp. 43a-58a].

III. PETITIONER ESTABLISHED THAT SHE HAD A PROPERTY RIGHT IN HER GOVERNMENTAL EMPLOYMENT AND SHE HAS PROVIDED THE COURT A COMPELLING REASON WHY THE PETITION SHOULD BE GRANTED TO REVIEW THIS CONSTITUTIONAL ISSUE.

Petitioner, the holder of an MBA degree and a Certified Public Accountant, was hired by Respondent County on January 18, 1994. [Butler Depo. pp. 12, 19.] County Ordinance provided that Petitioner's probationary period

would end after six months of continual employment, unless extended before the probationary period ends. [Pet. for Writ. of Cert., App. D, 31a, 32a.] Petitioner completed her probationary period as a governmental employee with Respondent County on July 18, 1994. [Pet. for Writ. of Cert. App. C, p. 9a.] On July 25, 1994, after Petitioner's probationary period expired, Respondent Hillard issued Petitioner a letter dated July 22, 1994 purporting to extend her period of probation for an additional three months. Based on Section 2-248 of the County Ordinance, Petitioner unequivocally acquired the right to grieve a termination by the time Respondent Hillard purported to extend her probation. [Pet. for Writ. of Cert., App. A, pp. 35a-42a.] Respondent Hilliard's classification of Petitioner as a probationary employee deprived her of the regulatory right to grieve her termination. *Id.*; [Petitioner's Reply to Response to Petitioner for Writ of Cert., App. A, pp. 1a-3a.] Even though Petitioner was classified as a temporary employee and deprived of grievance rights, she sent a letter to the County Council after she had a meeting with the state unemployment officials. [Petitioner's Reply to Response to Pet. for Writ of Cert., App. B, p. 4a.]

Petitioner submits that once she became a regular employee of Respondent County, her at-will status became irrelevant as to whether she had acquired property rights as recognized by this Court under *Perry v. Sinderman*, 408 U.S. 593 (1972). The precedent from this Court required the Respondent County to "comply with its regulations that are congruent with the requirements of constitutional due process." *Detweiler v. Com. of Va. Dept. of Rehab. Servs.*, 705 F.2d 557, 561 (4th Cir. 1983) (citing *United States v. Caceres*, 440 U.S. 741, 749 (1979)).

Petitioner asserts in the Petition that the lower courts deviated from its own precedent and controlling authority

in deciding the due process issue, a compelling reason for this Court to grant the petition. Respondents have failed to discuss the applicability of the case law that Petitioner raised in the petition concerning the due process issue. In actuality, the Respondents have failed to address any of the issues that were raised on this point in the Petition.

As to the "policy or custom" issue that Respondents raised, "proof of the existence of a municipal policy or custom under Section 1983 does not require a plaintiff to evidence numerous similar violations." *Hall v. Marion School District No. 2*, 31 F.3d 183, 195 (4th Cir. 1994). Citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). This Court held that in certain circumstances, a single violation is sufficient to invoke municipal liability. The court reasoned that to hold a municipality liable for a single violation, the decisionmaker must possess "final authority to establish municipal liability with respect to the action ordered." *Id.* at 481, 106 S.Ct. at 1209 (footnote omitted). Also citing *The City of St. Louis v. Prapronik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). This Court further defined when a municipality can be held liable for a single constitutional violation. "First, . . . municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, that is, acts which the municipality has officially sanctioned or ordered." Second, only those municipal officials who have "final policymaking authority may by their actions subject the government to Section 1983 liability." Third, whether a particular official has "final policymaking authority" is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Id.* 485 U.S. at 123, 108 S.Ct. at 924 (emphasis in the original). In *Praprotnik*, the Court held that the City of St. Louis

could not be held liable for the allegedly unconstitutional action because the supervisors who allegedly engaged in unconstitutional behavior did not possess final policy-making authority. *Id.* 485 U.S. at 130, 108 S.Ct. at 927-28. However, the Court reiterated that a municipality can be held liable for the acts of their employee if such actions are ratified by the final policymakers. As explained by the Court, "[w]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127, 108 S.Ct. at 926 (emphasis in original).

Although Respondent Hilliard was not considered to have "final policymaking authority", the Respondent County is liable. The State of South Carolina has granted authority to the governing body of the County, County Council, to hear grievances and to render the final approval or decision of the grievance committee. [S.C. Code § 8-17-120 *et seq.*]. Butler requested a hearing from County Council on October 11, 1994 in a written document dated October 7, 1994 because Hilliard denied her of her rights to procedural due process. [Butler depo. Ex. 2; Affidavit of Butler]. The Council discussed Butler's request and voted to deny her request. [App. B, p. 3a]. Butler had satisfactorily performed her six-months of initial service, however, she was not granted regular status. [Butler depo. Ex. 2; Affidavit of Butler, Pet. for Writ of Cert., App. F, 59a]. Therefore, by voting to allow Butler's dismissal to stand, County Council approved and subsequently ratified Hilliard's unconstitutional behavior. Accordingly, the County may be held liable for the acts of its final policymakers, County Council.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

COUNTY OF ORANGEBURG
P.O. Drawer 9000, Orangeburg, S.C. 29116-9000
Telephone 803/533-1000

July 22, 1994

MEMORANDUM

TO: Avis W. Butler

FROM: Donnie L. Hilliard s/s Donnie L. Hilliard

SUBJECT: SIX MONTHS EVALUATION

The six months evaluation for the position of Finance Director is now due, and I am in the process of evaluating that activity. As you recall, you were also assigned a division director's slot during this same six months period. I am trying to devise a method to combine the evaluation process for those two assignments. It is resolved in this manner.

I am going to extend your probationary period for an additional ninety days. This extension is being given to allow time for a complete evaluation of the function of division director—especially as it relates to the management aspect of the assignment.

During the next ninety days I am requesting that you concentrate on the following areas:

Leadership

Influence employees and others instead of ordering them.

Delegation

Make assignments to employees and then review the outcome, not molding and critiquing their assignments on a daily basis.

Human Relations

> Develop a mode of our cooperation and collaboration so that you will gain respect and loyalty from employees and especially the elected positions. As it relates to elected officials not getting your assignments done, it is suggested that you direct all of your detailed involvements with them through me.

As it relates to the Finance Director's assignment during this six months period of probation, you have done a superb job. You are progressing well, and I would strongly suggest that you continue to pursue the accounting system and develop an understanding of it so that we could enhance the system to provide financial reports on a monthly basis. This feat would permit us to make stronger management decisions.

If there is anything that I would classify as less than expected, it would be your attendance during the six months period you have served as Finance Director. While it is nothing major, I request that you notify this office of your schedule. On numerous occasions I have called for you only to be informed that you were out or would be in later. Instruct your staff to notify me when you are not going to be in the office, or, you can call me directly.

Thank you for your cooperation and assistance to date. We will revisit this matter for closure during the month of September or early October, 1994.

APPENDIX B

COUNTY OF ORANGEBURG
P.O. Drawer 9000, Orangeburg, S.C. 29116-9000
Telephone 803/533-1000

October 20, 1994

VIA CERTIFIED MAIL

Ms. Avis W. Butler
533-G Coachman Drive
Sumter, South Carolina 29154

Dear Ms. Butler:

On October 11th your letter dated October 7, 1994, to me was delivered to the Clerk for County Council. In your letter you have requested a grievance before Council. On October 17th, County Council discussed your request for a grievance and voted to deny your request for the following reasons.

According to the Orangeburg County Code of Ordinances, Section 2-248, an employee has ten (10) calendar days in which to present a grievance. Additionally, under the same section the grievance procedure is available only to regular employees and is not available to probationary employees. Your discharge from employment with Orangeburg County occurred on September 23rd. The grievance request was not presented until October 11th as stated above. Accordingly, the grievance request was not within the ten (10) day period. Additionally, at the time of your discharge you were still deemed to be a probationary employee. For these reasons, your grievance must be denied.

Sincerely,

/s/ Vernon Ott
Vernon Ott, Jr., Chairman
Orangeburg County Council

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Case No. 5:97-1412-06BC

AVIS BUTLER,

Plaintiff,

-VS-

COUNTY OF ORANGEBURG, SOUTH CAROLINA, and DONNIE L. HILLIARD IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants.

DEPOSITION OF: MS. AVIS BUTLER
November 17-18, 1997

* * * *

[109] Q. Would that be then what you told the Employment Security Commission?

A. No. Because I wrote this on their behalf. And so this document dated [110] October 7, Exhibit Number 2, was written as a result of my conversation with them.

Q. With who?

A. With the unemployment people.

Q. Your letter to Vernon Ott was written for the Employment Security Commission?

A. It was written as a result of my conversation with them. I had just left their offices. And they had received the information, both the termination and probationary

letters from Bill Clark. And I said to them, I said now since you've received that, I now have a formal means of complaining to Mr. Ott. That's what I said to them. And she said she would give me 48 hours to get that information together.

* * * *

[119] Q. Do you know whether or not there was any policy of allowing employees to comment, to provide written coments or rebuttals to evaluations?

A. Not on probationary evaluations. There were none.

Q. Did you petition County Council to overturn the extension of your probationary period?

A. You can't do that as a probationary employee.

Q. Did you file any sort of lawsuit or any [120] other kind of complaint about the extension of your probationary period?

A. Yes. When I filed this suit which included my probationary period and my termination. Yes.

Q. So is it your testimony then that this litigation inc'udes a claim of wrongful extention of a probationary period?

A. Probationary and termination and subsequent termination.

Q. Those are two separate issues aren't they?

A. As a probationary employee, you don't have any rights to do anything. So you have to wait until you get the opportunity to do something. When I was terminated, I mean my adverse action first started with the probationary. Taking my rights away from me to do this.

* * * *

APPENDIX D

DEFENDANTS' FIRST RESPONSE TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION

* * * *

3. For each person known to the party or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

Answer: Mr. Hilliard is the County Administrator and a named defendant. He is expected to deny the material allegations of the amended complaint and testify that he extended plaintiff's probationary period and terminated her employment because of performance deficiencies.

Mr. Clark is the Assistant County Administrator and Personnel Director. He is expected to testify that after plaintiff came to him in July of 1994 and reported that Janella Shuler had told plaintiff that Mr. Hilliard had sexually harassed Donna Livingston, he investigated plaintiff's report and found it to be without any substance.
* * *

* * * *